formance of the work is voluntarily assumed in the first instance, or is a special duty imposed by the legislature, and assented to by the county: *Hannon* v. *St. Louis County*, 62 Mo. 313 (following *Mower* v. *Leicester*, 9 Mass. 247), where, by the negligence of the contractor, a workman, employed by him, was killed by the caving in of a ditch dug on the grounds of the county insane asylum, under the supervision of the county engineer, and the county was held liable.

"A distinction is, also, made between those corporations which are created as exceptions and receive special grants of power for the peculiar convenience and benefit of the corporators, on the one hand, and the incorporated inhabitants of a district, who are by statute invested with particular powers, without their consent, on the other. * * * The reason which exempts these public bodies from liability to private actions, based upon neglect to perform public obligations, does not apply to villages, boroughs and cities which accept special charters from the state. The grant of the corporate franchise, in these cases, is usually made only at the request of the citizens to be incorporated, and it is justly assumed that it confers what to them is a valuable privilege. This privilege is a consideration for the duties which the charter imposes." See Cooley's Const. Lim. 247–8, and the cases there cited.

Considered in the light of the authorities above cited, and which might easily be multiplied, the decision in the principal case seems entirely correct.

M. D. EWELL.

Chicago, June 11, 1880.

Supreme Court of Vermont.

LUKE P. POLAND *v.* LAMOILLE VALLEY RAILROAD CO. ET AL.

A railroad company issued in succession three series of bonds, secured respectively by first, second and third mortgages. Afterwards it being found necessary to issue more bonds to complete the road, 18-23ds of the first mortgage bondholders agreed that a preference mortgage, which should be a lien prior to the bonds held by them, should be given to secure such additional bonds. Upon a bill filed to ascertain the priorities of the securities: *Held*, that the agreement of the 18-23ds of the first mortgage bondholders did not work a forfeiture of their lien as against the second and third mortgages, but that equity would treat their agreement as an equitable mortgage of their lien to secure the preference mortgage bondholders.

A statute of Vermont authorized railroads to mortgage their rolling stock and personal property without delivery of possession; but provided, that nothing in the act should prevent such property from being attached for claims for services rendered or materials furnished in running the road or keeping it in repair. The mortgagees of an insolvent railroad which was indebted for such claims filed a bill against all parties in interest, and obtained the appointment of a receiver to run the road until final decree. *Held*, that the right given by the statute to the holders of these claims to obtain a priority over the mortgagees, was not lost by the appointment of the receiver.

Held further, that although such claimants could not proceed at law by attachment against the property in the hands of the receiver, yet the court would give

effect to the right to such attachment by enforcing the priority of their claims in the administration of the property.

Held further, that such claimants had not lost their priority by taking promissory notes for the amounts of their debts.

Held further, that as the rolling stock had been diminished in value in its use by the receiver, and as the mortgage of the road provided for the application of its income to its current expenses, these creditors were entitled, after the mortgagees had been given a reasonable time to pay their claims, to have the rolling stock sold, and if the proceeds proved insufficient, then to have the net earnings of the receivership applied to the payment of their claims.

Held further, that the services for which the statute gave an attachment were services of employees who actually performed the manual labor, and not services rendered in the official and executive management under which the work was done.

Held further, that the materials for which the statute gave an attachment, were such only as were indispensable in making repairs, and were annexed to the property and became part of it, or were consumed by it in the use, but did not include office-rent, stationery, telegraphing, printing of bill-heads, tickets, time-tables, &c.

BILL in equity for an account and foreclosure, and the appointment of a receiver.

On the first day of May 1871, the Lamoille Valley Railroad Company, the Montpelier and St. Johnsbury Railroad Company and the Essex County Railroad Company, associated together for the purpose of building a railroad from the Connecticut river to Lake Champlain, known as the Vermont division of the Portland and Ogdensburg Railroad Company; in order to raise money to construct, complete and equip their railroad, they executed to Luke P. Poland and Abraham T. Lowe, as trustees, a trust deed of their railroad, including all its real and personal property, together with the tolls and incomes and all their corporate rights and franchises in trust to secure the payment of $2,300,000, in joint bonds issued by said companies, with semi-annual interest coupons attached. In the habendum it was stipulated that the conveyance was made and accepted upon the following trusts:

1st. To secure the payment of the principal and interest upon the joint bonds ratably and without preference, &c.

3d. Until default in payment of the principal or interest, or in performance of the covenants of the mortgage to permit the mortgagors to operate and repair the said railroad and *take, receive and use the tolls, rents, issues, incomes and profits thereof, and apply the same to the payment of the current expenses of the roads*, and to the purchase of necessary machinery and equipment, or dispose of the same for the lawful uses of the mortgagors in any manner not

inconsistent with the mortgage, with power to pay any net annual income to stockholders after providing for the interest on bonds.

4th. In case of default in payment of the principal or interest upon the said bonds, as the same should come due, and of a continuance of such default for four months after written demand of payment, then the trustees, upon the written request of the holders of a majority in amount of such bonds in respect whereof the default was made, should take possession of all, or, in their discretion, any part of the mortgaged premises, and operate the said railroads and receive the income, and out of the same pay: 1st. The expenses of operating the same, including such reasonable compensations as they might allow to the several persons employed or engaged in the running and superintendence of the same, and all taxes, assessments, *charges or liens having priority or preference to the lien of these presents* upon the said premises or any part thereof, and a reasonable compensation to the trustees, and also the expenses of keeping the said roads and appurtenances, the locomotives and rolling stock thereof in good and sufficient repair, &c.

6th. The trustees were empowered, after a default for six months and on request of the holders of three-fourths in amount of outstanding bonds, to take possession and sell the mortgaged premises at auction.

On the first day of April 1874, said companies executed a second mortgage of the same property to the same trustees to secure the payment of joint bonds to the amount of $1,770,000, and upon the same trusts as those expressed in said first mortgage. About $125,000 only in bonds were issued under this mortgage.

On the first day of January 1875, said companies, jointly with the Lamoille Valley Junction Railroad Company and the Maine division of the Portland and Ogdensburg Railroad Company, executed a third, called a consolidated mortgage, of their several railroads, to said Poland and Israel Washburne, Jr., and P. H. Brown, as trustees, to secure the joint bonds of all said companies, to the amount of $9,500,000, and upon like trusts to those expressed in said first mortgage. About $80,000 of this class of bonds were issued.

The first named three companies, having expended the proceeds of all said bonds and being insolvent, and said second, and said consolidated bonds being unsaleable, and the sum of $500,000 in money being necessary to complete their railroad, on the 18th day

of July 1876, executed a fourth, called a preference mortgage, of all the property, rights, tolls and income described in said first mortgage, to said Poland, trustee in trust to secure the payment of $500,000 in joint preference bonds issued by said companies and upon the other trusts expressed in said first mortgage.

And it was provided in said last-named mortgage that no bonds should be issued under it until the holders of the first mortgage bonds, to the amount of $1,800,000, should have signed an agreement in writing in the following words, to wit: "We whose names are hereto subscribed, holders of bonds of the numbers and amounts set against our respective names, issued under, and secured by the first mortgage of the Essex County Railroad Company, of the Montpelier and St. Johnsbury Railroad Company, and of the Lamoille Valley Railroad Company, hereby severally agree that for the purpose of completing and equipping the line of the said several railroads to Lake Champlain, in Swanton, Vt., under existing contracts or otherwise, and of paying the interest on the debts, for the payment of which a portion of such bonds are pledged, the said several railroad companies may issue bonds, to be denominated preference bonds, in character like the first mortgage bonds, to the amount of $500,000, secured by a joint mortgage of the several railroads and their equipment, like unto the first mortgage thereof, which shall constitute and be a lien on the same, prior to the bonds held by us severally; the mortgage and bonds to be made to the Hon. Luke P. Poland as trustee; said preference bonds to be payable, principal and interest, in gold, in twenty years, and at the option of said companies after five years from the first day of May A. D. 1876, and to bear interest at the rate of six per cent. per annum semi-annually. This agreement and consent is not to be binding until the holders of the first mortgage bonds, to the amount of $1,800,000, shall execute the same, nor until the trustee in the preference mortgage, being one of the trustees of the first mortgage, shall consent hereto in writing; said preference bonds are not to be pledged or sold for less than their par value without the consent of said trustee, and none of said bonds are to be issued by said trustee until he is fully satisfied that the said companies have made such arrangements and contracts, that the issue of said bonds will accomplish the completion of the line to Lake Champlain, and that said companies will pay the interest on the debts for the payment of which the first mortgage bonds are pledged, for at least two years from the date

of the preference bonds. Dated this seventh day of April A. D. 1876."

And the said paper was signed by holders of the first mortgage bonds, stating the numbers and denomination of the bonds held by each to about the amount of $1,870,000 dollars. And said Poland gave his consent as trustee thereto in writing, as provided in said agreement.

Default in the payment of interest upon the first mortgage bonds was made in May 1876, and about that time upon all classes of said bonds, and October 18th 1877, this bill was brought by the trustee under said preference mortgage, asking to have the priorities of said securities ascertained, an account of all said bonds taken and for a proper decree of foreclosure. The bill also set forth that the roads of said companies were very incomplete and unfinished, and must soon have a very considerable expenditure of money thereon; that said companies were largely indebted to many persons who are not secured upon the property at all; that if said roads remained in the hands of said companies, all the earnings of the roads and all the personal property would be taken for unsecured debts of said companies, and wholly diverted from the payment of interest due to mortgage bondholders; that complainant, as trustee under said preference mortgage, had declined to take possession and run said roads as trustee; that the trustees under the said first mortgage had also declined to take possession, and that they regarded it as simply impossible for them so to do without the greatest peril of pecuniary loss and ruin to themselves. Complainant therefore prayed the court to appoint a receiver to take possession and operate said road, under the order and protection of the court, until a final decree should be made in the premises. A cross-bill was filed by the trustees under the first mortgage with like prayer for relief.

The bill and cross-bill also set forth that complainants were informed and believed that the said railroad companies, in the running and operating their said roads, jointly, as aforesaid, had become indebted to various persons for services and supplies furnished for that purpose, and that such creditors claimed to have some kind of equitable lien either upon said roads or the personal property thereon, or the earnings and income thereof; that complainants had no knowledge as to the amounts so due, or to whom, except that they were informed that George E. Howe, of St. Johnsbury, and Capen, Sprague & Co., of Boston, Massachusetts, claimed to

be creditors of that character, and therefore complainants asked that they might be made defendants to represent their own claims and all others having like claims.

Receivers were appointed October 18th 1877, upon the filing of the original bill, who immediately took possession of all said property and still hold it.

The original and cross-bills were answered by the trustees and sundry bondholders under the consolidated mortgage, and by J. R. Nichols, a first mortgage bondholder, who did not assent to the preference mortgage, and by George E. Howe, Capen, Sprague & Co., unsecured creditors named in said bills. These creditors also filed a cross-bill, claiming a priority upon the personal property described in said mortgages, and upon the earnings of said mortgaged property for the payment of their claims. This latter cross-bill was answered by the orator in the original bill and by certain holders of first mortgage bonds, denying all equity therein. It was also demurred to by sundry other bondholders.

A master was appointed to take an account of the several classes of bonds, and an account of the debts of George E. Howe, Capen, Sprague & Co., and other creditors in said last mentioned cross-bill named and claiming to be preferred creditors.

The cause was heard before a chancellor at the June term of the Court of Chancery for Caledonia county, and a *pro forma* decree entered upon said cross-bill of the trustees under the first mortgage in favor of said trustees for a foreclosure against the trustees and bondholders under said second and consolidated mortgages and said companies, and in case such decree became absolute the decree further ordered a foreclosure in favor of said trustee under the preference mortgage against said companies and such holders of first mortgage bonds as assented to the preference bonds, unless said preference bonds be paid within a time therein limited, and further ordered that said trustee be subrogated to and have all the right and interest of said assenting bondholders in said first mortgage, and further ordered that the cross-bill of the preferred creditors be dismissed.

The trustees under the consolidated mortgage, J. R. Nichols, a non-assenting first mortgage bondholder, and the preferred creditors appealed.

L. P. Poland, for trustees under first mortgage.

E. J. Phelps, *B. F. Fifield* and *Guy C. Noble*, for preference bondholders.

Thomas H. Russell, for appellant, Nichols
Davis & Stevens, for trustees under consolidated mortgage.
Belden & Ide, for preferred creditors.

The opinion of the court was delivered by

POWERS, J.—The first question presented upon the appeal is, whether the preference bonds are entitled to the priority which the parties concerned in their issue intended they should have. No one of the first mortgage bondholders who assented to the issue of the preference mortgage by the railroad company, and who signed the agreement above recited dated April 7th 1876, is here objecting to the priority now claimed for the preference bonds. But they stand in court content to have the priority of the preference bonds accorded to them as agreed, and the duty of redeeming their interest in the first mortgage, enjoined upon them as ordered by the decree below.

The appellant, Nichols, claims that by the transaction resulting in the preference mortgage, the non-assenting first mortgage bondholders *alone* now have the security of the first mortgage. The trustees under the consolidated mortgage claim substantially the same thing.

The bonds issued under the first mortgage share ratably, and without preference in the mortgage security. The whole amount issued was $2,300,000. Those assenting to the preference mortgage in round numbers amount to $1,800,000, and the non-assenting to $500,000. The non-assenters therefore own 5-23ds of the first mortgage.

Nothing can advance the fractional share of the non-assenters except an extinguishment of the bonds of the assenters or a cancellation of the security pledged for their payment; neither event has transpired. The bonds are as valid now as before the execution of the agreement and the preference mortgage. The security of the first mortgage is still pledged for their payment as before.

No attempt was made—none could successfully be made—to give a priority to the preference bonds over those of the non-assenters, or, by a kind of tacking, to postpone the consolidated bonds.

The assenters undertook to deal with their own bonds and security in a way to improve their value. If the assenters had

pledged their bonds to A. for collateral security, their ratable share of the first mortgage would go to the assignee.

Leave the fact of the preference mortgage itself out of view, and suppose that the assenting first mortgage bondholders, desiring to raise money to complete the road, and thus make their security valuable, had loaned of A. $500,000, and pledged their interest in the first mortgage as security by an instrument as informal as the agreement in question, would not a court of equity, as between the parties, treat the agreement for security, *as* security? That is precisely the effect of this agreement. The assenters said to the preference bondholders, you lend your money to the companies to enable them to complete their road, and take their mortgage, which as a lien upon the property must be subject to all existing encumbrances, and we will give you as a further security our interest, or 18-23ds of the first mortgage, as collateral. We will encumber that interest with the burden of your debt; we agree that your bonds "shall be a prior lien upon the property." Is there anything in this transaction prejudicial to the rights of other parties interested in the property or anything incapable of practical enforcement in a court of equity? The preference bondholders did not lend their money upon the mortgage by the companies of a property already hopelessly buried under the load of three existing mortgages, nor on the credit of the insolvent companies. They demanded security and the assenters undertook to give security.

There can be then no question as to the *purpose* of the agreement. The agreement is that the preference bonds shall be a lien upon the property prior to the bonds held by the assenters, not prior in time, but prior in order of payment. This agreement was incorporated into the bonds themselves and thus made them an equitable mortgage: Jones on Railroad Securities, sect. 75. A lien upon the property prior to the bonds of the assenters could only be created by subordinating their lien to the new lien, that is by mortgaging the first as security for the second.

There is nothing in the estate of a mortgagee that makes such a mortgage in equity invalid or impossible. Want of form is immaterial. Equity looks only to the substance and so moulds that into form as to work out the intent of the parties. A mere agreement to give a mortgage is treated in equity as a mortgage: Jones on Mortgages, sects. 163, 167; Jones on Railroad Securities, sect. 73, *et seq.* Even if the agreement undertakes to mortgage a thing not *in esse*, equity

will treat the contract as a mortgage when the thing comes into being, and charge it with a lien in favor of the party intended: Jones on Railroad Securities, sect. 122, and numerous cases there cited. When, therefore, the decree in favor of the first mortgage bondholders becomes absolute, the assenters will hold their interest charged with the lien agreed to be given to the preference bonds. An equitable mortgage will not be upheld which works a wrong to third parties, but where their interests are undisturbed, they are enforced for the purpose of executing the intent of the parties: *Miller* v. *R. & W. Railroad Co.*, 36 Vt. 452; Jones on Railroad Securities, *passim*.

To carry out the intent of the parties in this case works no wrong to the non-assenters, as they stand under the decree precisely as they would if no preference mortgage had been made; nor to the consolidated bondholders, as they must redeem only so much as they voluntarily assumed when they took their mortgage. The invalidity of the agreement is not urged by the party bound by it, and neither of the appellants ought to be heard to question it, much less to profit by it.

By what system of logic is it established that this attempt to give security is to be held *inoperative* to effectuate the purpose intended, but *operative* to *work a forfeiture* of 18-23ds of the first mortgage? What has occurred to advance the interest of the non-assenters from 5-23ds to 23-23ds of that mortgage?

The transaction amounts to a mortgage, or it is altogether *inoperative*. By it the interest of the assenters either *passed in pledge*, or did not pass *at all*. If it did not pass, it remains where it was lodged before, and the assenters still hold their fractional share in the first mortgage.

To say that a court of equity shall defeat the purpose of this scheme that was devised, and has been operative to make the first mortgage more valuable, the share of the non-assenters equally with the rest, and at the same time declare that by means of it, the share of the non-assenters, who have paid nothing, has been magnified five-fold, is a novel proposition to advance in a court of equity. All the advantage that the non-assenters can reap from the transaction is found in the increased value of their security.

The questions arising upon the cross-bill of George E. Howe and others are new in this state, but are of easy solution.

These orators as a class are seeking to enforce a common right

against a common fund which they claim is, in equity, chargeable in their favor. The bill is not multifarious, and these orators have a proper standing in court. They insist that the companies were indebted to them at the time receivers were appointed for services rendered and supplies furnished to the railroad, and that the seizure of the property by receivers has not defeated their right to charge the chattel property, and the net earnings of the receivership with the payment of their claims.

They predicate their claims, first, upon sections 101 and 102 of chap. 28, Gen. Stat., which reads, "Section 101. All mortgages of railroad franchises, furniture, cars, engines and rolling stock of any kind, when properly executed and recorded, shall be effectual to vest in the mortgagee a valid mortgage interest in and lien upon all such property without delivery or change of possession; and for the purpose of mortgage, all such property shall be deemed part of the realty.

"Section 102. Provided, nothing in the preceding section shall prevent such furniture cars, engines and rolling stock, from being attached by any person having a claim against the corporation owning such property for an injury sustained on the road of such corporation, by reason of any neglect of said corporation, or *for services rendered or materials furnished for the purpose of keeping said road in repair, or in running the same*, or for any liabilities as common carriers, or for the loss of any property while in the possession of said corporation; and such property when so attached may be taken, held and disposed of in the same manner as it could have been if that section of this chapter had not been passed."

At the time the several mortgages above described were executed, we had no law in this state authorizing the execution of chattel mortgages and but for this section, 101, such mortgages of chattel property by railroad companies would be invalid as against creditors and purchasers. To obviate this embarrassment sect. 101 was passed enabling railroad companies to make a valid mortgage of personal property.

But section 102 is a proviso to section 101. The intent of the section is that such mortgage shall be inoperative against the liabilities specified. It affirms the right to attach the chattel property, and hold and dispose of it in the same manner it could have been done if that section had not been passed. If that section had not been

passed, such mortgage without change of possession would be void as to creditors.

As against the preferred creditors, therefore, the property, remains unencumbered by the mortgage.

This statute was in force long before the execution of the mortgages, hereinbefore described. The bondholders, therefore, took their security with notice of its subordination to the rights of such claimants.

In view of the necessity of a change of possession to make such a mortgage effectual, it is clear that no court of equity would undertake by means of a receivership to seize the property, and give to the mortgagee a possession that would, or could, operate as a *substitute* for the possession required by the statute, especially upon the ground avowed in this bill, that the trustee cannot afford to take possession and asks the court to do so to prevent the exercise of this very right of attachment which is accorded to these creditors. Such a proceeding would work a nullification of the statute—it would be an attempted overthrow of a legal right and priority which no court has the power to accomplish. The doctrine is elementary that the appointment of a receiver alters no existing rights in respect to the property seized. It merely stays the enforcement of rights by the parties in interest for the time being. It operates like an injunction *pendente lite*.

By the terms of the deed of trust, the trustee, upon default in the payment of interest on the bonds for four months after demand and on request of a majority of the bondholders, was empowered to take possession of the property—run and operate the road and take the income.

Counsel argue that this entry into possession was accomplished by the creation of the receivership; that the receivers are holding for the mortgagees; that the receivership was the result of a "race of diligence" between the bondholders and these creditors, and that the only right accorded the creditors by the statute was the right to attach the property, if by diligence they could reach it before the bondholders seized it.

Whatever might be claimed for a possession by receivers established upon other grounds, it is obvious that in this case they do not hold solely for the mortgagee. The authorized representative of the bondholders declined to take possession under his mortgage right. He implored the court to take possession not for him nor

those he represented, but to prevent these creditors getting in, and asked the court to hold the possession and operate the road by receivers "until a final decree be made in the premises."

The receivers hold for whom it may concern. The creditors are made parties defendant to the bill and cross-bill; they are asked to set forth and litigate their rights; they have done so upon proper averments and proofs and upon answer made to their claim. The final decree therefore, "which shall be made in the premises," will determine the priority to this chattel property, which among other things the court is asked to seize. The receivers hold for the contending parties; for the creditors as well as all others interested.

Although the statute accords the right of attachment, a right merely to proceed at law, still this right is to have effect in equity if the creditors standing upon it are summoned to that forum to establish it. It verges upon serious trifling to say to these creditors, you ought to have attached this property and not slept upon your rights a year or more until the court seized it. It is subjecting the valuable substance to technical mode and form, and enabling crafty vigilance by the aid of the official signature of a chancellor, obtained *ex parte* without notice, to place that valuable substance beyond the reach of those entitled to it, not by any adjudication that changes the *character of the right itself*, but a change of venue that renders the statutory remedy technically improper in the new pasture given to the property.

Section 102 makes the chattel property attachable on a claim for a personal injury on the road. If A. received a severe injury by the gross negligence of the company, could the company screen the property from liability by a "change of ministry?" Could the bondholders wrest the property from liability by securing receivers upon an *ex parte* application and hearing before A. had even had time to take out process? Is this new way of paying old debts to receive the sanction of a court of equity?

The *right* to attach the chattel property, exists now as perfectly as before the appointment of receivers, but the court adjudged that the best interests of all concerned would be subserved by enjoining the exercise of the right, and having so determined, it is not supposable that the court would surrender the property to an attaching officer now, thus ending all occasions for a receivership. The litigation of this question having begun in equity and the court having assumed the handling and custody of the property, the case

will be retained in that court for the final determination of all questions arising under the claim of any party interested.

These creditors having a priority of legal right and the receivership conferring no new rights upon the mortgagees, it is for the court to give effect to this priority in the administration of the property. The receivership is to be made chargeable as holding the chattel property, subject to the prior right of these creditors to have it made answerable to their claims.

The master's report shows that the chattel property when taken by the receivers was worth enough to satisfy these preferred claims. It has been used in the operation of the road, and, consequently, some of it has been consumed and destroyed, and all of it much worn and depreciated in value. Other property of like kind has to some extent been supplied in its place, but this is not all available to these creditors.

The receivership must be made a debtor and held to respond from such resources as it has, properly applicable for that purpose.

The ground of the application for the receivership was the danger that these creditors would attach the chattel property and that all its earnings, and the earnings of the road would be taken to pay the unsecured creditors. This application could have been fully answered by an injunction. In that case security for consequential damages would be furnished by bond, and the property would have remained in the custody of the mortgagor pending the proceedings to foreclose. The receivership without bond of indemnity cannot be permitted to operate differently upon the claims, rights and interests of the unsecured creditors, from an injunction, nor work a greater embarrassment upon the assertion and realization of such claims, rights and interests.

We have thus far considered the equity of these creditors to have this chattel property made available to them as flowing from the priority given them by the statute in question.

But there is another ground equally tenable upon which the receivership is equitably bound to respond, by applying the net income of the railroad property in payment of these debts.

As we have seen, this mortgage is made upon the trust that until default made in the payment of interest, the mortgagor shall remain in possession, operate the road, take the tolls, rents and incomes, *and apply the same to the payment of the current expenses of the road* or *dispose of the same for the lawful uses of the mortgagor.*

The mortgagees took their security *burdened with this trust.* The claims of these creditors are "current expenses of the road." They should have been paid by the mortgagor out of earnings. If the earnings had been kept intact and, on the appointment of receivers, had been delivered to them in cash, would not a court of equity order that they be first applied in satisfaction of all back arrearages of expense incurred by the mortgagor in the operation of the road. The mortgagees could not object because *they agreed* that these earnings *should be* so applied. The receivership altered no rights in this respect, unless the doctrine that the "race of diligence" gives to the mortgagee earnings that they have agreed belong to other parties, can be upheld. The mortgage of the tolls and incomes does not give these earnings to the mortgagee. All that passes under *such* a mortgage is *net income.* Income means what is left after paying the expenses of earning income.

The trustee declines to take possession, and asks the court to exercise an unusual and extraordinary jurisdiction in appointing receivers. Seeking equity he must do equity. The court might at the outset make it a condition in the appointment of receivers that these debts should be paid or require security for them to be furnished, or the order can be made at any later stage of the proceeding: *Fosdick* v. *Schall*, 9 Otto 225; *Ellis* v. *B. H. & E. Railroad Co.*, 107 Mass. 1; *Douglass* v. *Cline*, 12 Bush. 608; *Duncan* v. *Ches. & Ohio Railroad Co.*, U. S. C. C., Virginia District, 15 Am. Law Reg. 428, July 1876, and many other cases.

No case has been cited to the contrary and probably none can be found. By the terms of the mortgage, the mortgagor was bound to pay these debts from current earnings. The mortgaged estate is now *equitably indebted* for the same. It would be highly *inequitable* for the receivers to take the estate relieved of this equitable burden. Until the mortgagee takes possession of the road, he has no right to its earnings superior to the mortgagor. The earnings follow the possession. Whoever holds possession of the thing that makes earnings, takes the earnings made.

Here the receivers hold possession for all parties in interest. The parties in interest are the mortgagees, the mortgagors and these preferred creditors, and the receivers must distribute net earnings among these parties as their respective equities may appear. A large amount of net earnings has already been expended in making a new road, thus enhancing the value of the property as a security

for the bonded debt; this chattel property upon which these creditors have a claim paramount to the mortgages has been used and much of it worn out in making this net income so expended. After default in payment of interest, the mortgagor was suffered to remain in possession and incur the debts of these creditors in repairing the road, and running it in the fulfilment of its duties to the public. Can it be said that the mortgagees shall now be permitted to claim that they have a superior equity to take the benefit of these services, take the use of this chattel property and take the increased value of their security without obligation to do equity? Can they return the chattel property in its depreciated condition in full satisfaction of the claims of these creditors upon it? The mortgagor has no equity to the net earnings. The question then is limited to the relative rights of the mortgagees and these creditors. As between these parties, under the circumstances of the case, it is beyond question that the receivership is bound to apply its net income first to the discharge of their claim. It is to be noted that this application of net income is merely *paying an obligation that equitably rested upon a portion of the property* seized by the receivers and which has been largely consumed to the advantage of the mortgagee and thus consumed upon the mortgagee's express *request*, and that net income is the *only* resource in the *first* instance that is properly applicable to the discharge of *any* debt of the receivership, except expenses of operation.

The Supreme and Circuit Courts of the United States have repeatedly promulgated this doctrine, and the highest courts of many of the states have concurred in it. (See cases, *supra.*) If any case denies the doctrine, it has not been shown to us.

What creditors under the statute have this preferred right to attach this chattel property?

It is clear that construction expenses are excluded in section 102. It is clear that general creditors are excluded. The statute (section 101), makes the mortgage valid against all creditors except those specially enumerated in section 102. Every liability specified in section 102, grows out of the *actual operation* of the road. It is a matter of general notoriety that the construction and operation of railroads give rise to great conflicts of interests between security holders, which portend imminent peril to the wages of employees. This statute was intended as a protection to them. It was the purpose of the legislature to protect a class of

employees who could not protect themselves. The protection afforded, however, is in derogation of the rights of other creditors, and therefore cannot be extended by construction beyond the *class* of creditors specified: *Coal Co.* v. *Central Railroad Co.*, 29 N. J. Eq. 252; *Pennsylvania and Delaware Railroad Co.* v. *Leuffer*, 84 Penn. St. 168.

In nearly all the states, statutes of similar import exist, all having the same object of giving protection to a class of operatives, who, scattered along the line of a railway, are engaged in a service that precludes sharp watchfulness over the solvency and honesty of their employers, and lack the means and opportunity of guarding their own interests.

The master has tabulated a list of claims (pp. 43–49, printed case) for *services rendered*, and *materials furnished* in *repairing* and *operating* the road. Some of the claimants named in this list, might, from the duties they are generally understood to perform, be properly excluded from the preference accorded by the statute, such as the cashier and paymaster, and perhaps some others, but the difficulty is that although the mortgagees, interested to defeat the allowance of these claims appeared before the master by counsel, and made specific objections to many claims, yet so far as appears they made no objection to any claim enumerated in this list. No exception to the report raising any question upon this list of claims has been filed. No suggestion is made in brief or argument by any of the numerous counsel who have been heard that this list of claims included any claimants not entitled to share in the privilege given by the statute. It is not the business of the court to purge a list of claims that the parties do not question, but we are to treat it as the parties treat it, namely, as conceded to be correct.

Some of the claimants have taken promissory notes for the amount of their debts. Taking a note for an antecedent debt, is in this state presumably a payment of the debt, but the question is one of intent. If the debt is one that carries a security of priority, it is not to be presumed that a mere change in the form of the indebtedness was intended to defeat its priority, when the debtor is confessedly insolvent.

The statute must be construed in a way to carry out the intent of the legislature. When, therefore, it accords a priority to claims for "services rendered" or "materials furnished" for the

purpose of *keeping said road in repair*, or *in running* the same, it is not to be extended beyond the obvious import of the language used. Services rendered in keeping the road in repair might be construed so as to include the officers of the road, but it was the intent of the legislature to include only such persons as were engaged in manual labor in *making* the repairs.

Services rendered in running the road includes the same class of operatives and employees. The dividing line is between services rendered in the official and executive management and authority *over* the work of making repairs and running the road, and such laborers and employees as *do* this work. The *employers* are excluded, the *employees* included. Such is the rule adopted in other states having similar statutes. Thus directors are excluded. The superintendent, who is an *employee* in his relation to the corporation, is an *employer* in his relation to the work of repairing and running the road. He is the *alter ego* of the corporation itself. He is not within the privilege of the statute: Jones on Railroad Securities, sect. 580. Nor is the civil engineer: *Pennsylvania & Delaware Railroad Co.* v. *Leuffer*, 84 Penn. St. 168; *Brockway* v. *Innes*, 39 Mich. 47; Jones on Railroad Securities, sect. 580. Nor heads of departments, general agents and attorneys: Jones, *supra*. And as the latter claimants cannot gain a priority over general creditors for their services, they cannot gain it for rent of offices and stationery used, or telegraphing ordered by them. Such expenses are usual and proper in the operation of a railroad; so are the services of directors and attorneys, but they are *general debts* of the corporation.

It is said that the charges for printing tickets, bill-heads, posters, time-tables, &c., ought to be treated as *materials* furnished in running the road. It would be rather difficult to classify such supplies as materials furnished for keeping the road in repair. The word materials has substantially the same meaning when used in connection with the work of repairing that it has in the work of running the road, and means such supplies as are *indispensable* in making repairs upon the road or its equipments, and are annexed to the property and become part of it, or are consumed by it in its use, such as iron, ties, lumber, wood, coal, oil, &c. The same word is used in the statute, giving a lien upon buildings, steamboats, mills, factories, machinery, &c., to mechanics and material-men. The statute creating mechanics' liens belongs to the same *class* of legislation as

the statute in question. It has the same general object, applies to the same class of persons and works out, substantially, the same relief. The mechanic has a lien by law, provided he follows it by his attachment of the property. The railroad employee has a lien by law if he first makes attachment and thereby creates it. In the latter case, a lien upon the road-bed and superstructure would be of little value to the creditor, and hence the right to acquire it by attachment is limited to such property as can be made practically available.

The ground and reason of giving to a creditor who has furnished materials for repairing, erecting or operating a factory, a lien upon it or its machinery, is, that such supplies have been incorporated into the building, and thus not only lost their identity as chattels, but have increased the value of the principal thing to which they are annexed: *Stout* v. *Sawyer*, 37 Mich. 313; *Grosz* v. *Jackson*, 6 Daly (N. Y.) 463; Phillips on Liens, *passim*.

If a printer who supplied posters and tickets to officials running a steamboat or a theatre could fasten a mechanics' lien upon the boat or building, upon the theory that he had furnished *materials* for such structures he could gain a like priority in this case. Such, however, is not the construction given to this word as used in the statute relating to mechanics' liens. The word made use of (*materials*), looked at in connection with the general purpose of the statute, clearly refers to supplies of a different nature from printers' bills or printed matter.

The decree below dismissing the cross-bill of the preferred creditors must be reversed, and such of them as have brought themselves within this statute are entitled to relief.

In view of the condition of the road and its duties to the public and its security holders, a reasonable time should be allowed to the parties in interest to provide for the payment of these claims without serious embarrassment to the operation of the road, and failing to make such provision, the chattel property named in the statute should be sold under the order of the court and the proceeds ratably applied in payment of these claims, and if any part thereof then remains unsatisfied, the net earnings of the receivership must be applied to extinguish the same.

The cause is remanded with mandate embodying the views herein expressed.